(3)

No. 90-1844

MOTION FILED
JUN 21 1991

IN THE

Supreme Court of the United States

October Term, 1990

RAY JAMES MUNN, Individually, and Ray James Munn, Administrator of the Estate of Elaine Munn, Deceased, on Behalf of the Heirs at Law and Wrongful Death Beneficiaries of Elaine Munn, Deceased,

Petitioner,

vs.

TRUDY E. ALGEE,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH CONGRESS AND THE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MOTION FOR LEAVE TO FILE ATTACHED BRIEF AMICI CURIAE

The American Jewish Congress and the Christian Legal Society move for leave to file the attached brief amici curiae in this case. Respondent consented to the filing of this brief, but Petitioner refused to consent.

The American Jewish Congress is an organization of American Jews dedicated to the preservation of the political, civil, economic and religious rights of American Jews and, indeed, all Americans. To this end, it has filed numerous briefs in this and other courts in cases implicating the religion clauses of the First Amendment.

The Christian Legal Society is a non-profit professional association founded in 1961 with a present membership of 4,300 Christian judges, attorneys, law professors and law students. Concerned about constitu-

tional rights, it founded the Center for Law and Religious Freedom in 1975 to protect and promote the freedoms guaranteed by the First Amendment through advocacy and education.

Although the beliefs of the Jehovah's Witnesses against blood transfusions are derived from verses in the Biblical books of Leviticus and Deuteronomy prohibiting the consumption of blood, both Judaism and most Christian groups reject the Witnesses' interpretation of those verses. At issue here, however, is not the correctness of the Witnesses' biblical interpretation, but whether, consistent with the First Amendment, a jury may be charged with passing on the reasonableness of those beliefs.

Because this case was tried on a theory which at least permitted, and was in all likelihood actually understood by jurors to require them to do just that, amici believe that the judgment upholding the jury's

verdict was profoundly inconsistent with our national commitment to allow people to believe that which they cannot prove. Accordingly, they seek leave to file this brief amici curiae.

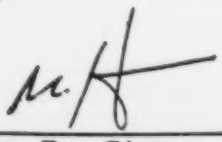

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF THE AMICI iv

STATEMENT OF THE CASE iv

STATEMENT OF THE FACTS iv

ARGUMENT 1

I. THE JUDGMENT OF THE DISTRICT COURT RESTS ON AN UNCONSTITUTIONAL EVIDENTIARY FOUNDATION, AS WELL AS A CONSTITUTIONALLY IMPERMISSIBLE JURY CHARGE 2

A. The Charge to the Jury Compelled It to Assess The Truth or Falsity of Munn's Religious Beliefs 2

B. The Admission of Irrelevant Evidence About the Beliefs of Jehovah's Witnesses Compounded the Taint 6

II. THE BARE POSSIBILITY THAT THE JURY REACHED ITS VERDICT ON CONSTITUTIONAL GROUNDS CANNOT SAVE THE JUDGEMENT 9

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Bachellar v. Md., 397 U.S. 564 (1970) 10

Bob Jones University v. U.S., 461 U.S. 574 (1983) 15

Boyde v. California, 110 S.Ct. 1190 (1990) 10, 17

Employment Division v. Smith, 110 S.Ct. 1595 (1990) . . . 13, 14, 15

Founding Church of Scientology v. U.S., 409 F.2d 1146 (D.C. Cir. 1969) 10

Goldman v. Weinberger, 461 U.S. 503 (1986) 15

In Re: Matter of Klein, 145 A.D.2d 145, 538 N.Y.S.2d 274 (2d Dept. 1989) 5

Leary v. United States, 395 U.S. 6, 31 (1969) . . . 10

Murphy v. ISKCON, 409 Mass. 842, ___ N.E.2d ___ (1991) . . . 10

Sherbert v. Verner,
374 U.S. 398 (1963) 14

Stromberg v. People,
283 U.S. 359 (1931) 10

Texas Monthly v. Bullock,
789 U.S. 1 (1989) 15

United States v. Ballard,
322 U.S. 78 (1944) 1, 4, 7, 9

Yates v. Evatt, 59 U.S.L.W.
4509 (1991) 9, 16

OTHER AUTHORITIES

Rules of Mississippi Supreme Court 45 13

INTERESTS OF THE AMICI

The interests of the amici are set forth in the motion for leave to file a brief amici curiae.

STATEMENT OF THE CASE

The amici adopt the statement of the Petitioner.

STATEMENT OF THE FACTS

The amici adopt the statement of the Petitioner.

ARGUMENT

Little else is currently settled under the Religion Clauses of the First Amendment, but it is surely still true that heresy trials are foreign to the Constitution. U.S. v. Ballard, 322 U.S. 78, 87 (1944). This case was tried in a way that shares the characteristic feature of such trials, namely that the jury was invited to take the measure of Munn's religious practices and determine their reasonableness.

The Court of Appeals recognized the impropriety of this approach. But it did not require a new, untainted, trial. Instead it reinterpreted the jury verdict in ways which did not dispel the taint which infected the trial. This holding is inconsistent with this Court's interpretation of the First Amendment, as well as its refusal to countenance jury verdicts resting on constitutionally suspect grounds.

A writ of certiorari should accordingly issue to review its judgment.

I. THE JUDGMENT OF THE DISTRICT COURT RESTS ON AN UNCONSTITUTIONAL EVIDENTIARY FOUNDATION, AS WELL AS A CONSTITUTIONALLY IMPERMISSIBLE JURY CHARGE

A. The Charge to the Jury Compelled It to Assess The Truth or Falsity of Munn's Religious Beliefs

Three times the jury in this case was told it could deny Munn's estate damages for injuries inflicted by Algee's negligence if it found Munn's adherence to the strictures of the Jehovah's Witnesses against accepting blood transfusion "unreasonable."

The jury was asked (Interrogatory 3):

> Do you find that defendant has proved ... that Elaine Munn's refusal of blood transfusion was unreasonable?

And the jury was asked further (Interrogatory 4):

> Do you find that the original injuries sustained by Elaine Munn combined with her unreasonable refusal of blood to cause her death?
>
> ...
>
> If your answer to this interrogatory is "Yes," what percentage did Elaine Munn's unreasonable refusal of blood contribute to her death?
> ___ percent (%)

The District Court did not further define "unreasonable" with special reference to religious practices. It did not instruct the jury that it was forbidden to pass on the validity of Munn's religious practices or whether these practices were "reasonable" compared to other religious or secular beliefs about blood transfusions.

There is no constitutional way for a jury to determine whether a particular religious practice is "reasonable" any more

than it can determine if a belief is true. Cf. U.S. v. Ballard, 322 U.S. at 84-86; Id. at 92-93 (Jackson, J. dissenting). The ordinary tools of secular philosophic, legal or moral inquiry, the ones constitutionally available to government agencies such as juries, do not answer the question of whether what one person believes to be the Divine command is reasonable -- that is, whether it is reasonable to believe that it represents God's will, or if it does, whether it is reasonable to understand that command to require one to yield one's life rather than violate it.

Indeed, whether it is reasonable to believe that God makes any demands of human beings, whether God's actions can be measured by human reason, and whether it is reasonable for human beings to defer to supernatural authority as justification for

moral choices are all hotly contested propositions which juries cannot resolve without breaching government's obligation of religious neutrality.[1] Plainly a judgment which rests on a charge which explicitly required inquiry into the validity of religious beliefs cannot stand.

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[1] To use another example, the Catholic Church teaches that a woman must yield her life rather than abort a fetus whose existence threatens her life. By contrast, Judaism teaches that, until birth the fetus must be destroyed if necessary to save the life of the mother. If Munn had been pregnant, and, as a result of Algee's negligent driving, had to decide whether to abort her fetus or lose her own life, how could a jury assess whether her choice of either of these positions was unreasonable without deciding which of these beliefs was morally valid? Cf. In Re: Matter of Klein, 145 A.D.2d 145, 538 N.Y.S.2d 274 (2d Dept. 1989) (application of husband to permit abortion on comatose pregnant wife injured in an automobile accident).

B. The Admission of Irrelevant Evidence About the Beliefs of Jehovah's Witnesses Compounded the Taint

The harm to Munn's rights does not arise just from the trial court's instruction to the jury to adjudicate the reasonableness of Munn's obedience to her religious beliefs. Rather, the entire trial was focussed on whether the central beliefs of Jehovah's Witnesses' are reasonable. Testimony about Witness beliefs concerning a citizen's obligation to country and other theological matters was admitted in order to 'enlighten' the jury. The trial court admitted this testimony because "the jury is going to be called upon to determine the reasonableness of [Munns'] beliefs considering [her] religion as one of the factors." [Trial Transcript at 127-28].

Algee's counsel emphasized this testimony in his summation to the jury. [A-29].

A divided Court of Appeals sustained the admissability of this evidence. Judge Rubin thought the admission of the evidence erroneous and prejudicial; [A-29-32]. Judge Smith thought it erroneous but harmless, although he termed the question "close." [A-6-8]. The conclusion that Munn was not prejudiced rests on the vote of Judge Barksdale, who thought the evidence admissible because it was "relevant to the doctrine of avoidable consequences." [A-24].

The jury's verdict thus rests on evidence whose only function was to "put [the Munns] to the proof of their religious doctrines or beliefs." U.S. v. Ballard, 322 U.S. at 86. Because the estate did not persuade the jury that a reasonable person

could embrace Witnesses' religious strictures against blood transfusions, it was denied relief to which it was otherwise entitled. Munn was put to her proof, but, in the eyes of the jury, fell short.

> The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

Id. at 88.

The jury here was invited into that forbidden domain by both the testimony it heard and the instructions it received. Its verdict therefore cannot stand.

II. THE BARE POSSIBILITY THAT THE JURY REACHED ITS VERDICT ON CONSTITUTIONAL GROUNDS CANNOT SAVE THE JUDGMENT

The Court of Appeals agreed that, given Ballard, the jury could not assess the reasonableness of Munn's religious beliefs. Since this was precisely what the jury was ordered to do, the presumption that jurors follow the instructions given should have required a reversal for a new trial. Yates v. Evatt, 59 U.S.L.W. 4509, 4512 (1991).

The Court of Appeals, however, affirmed the verdict by suggesting alternate understandings of what the jury might have decided. Even on the doubtful assumption that those possibilities were themselves constitutionally acceptable, there is no way to be certain that the jury had accepted these theories, and not the one suggested by the plain language of the instructions.

Settled law holds that "when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." Leary v. United States, 395 U.S. 6, 31 (1969). Accord, Boyde v. California, 110 S.Ct. 1190, 1197 (1990); Bachellar v. Maryland, 397 U.S. 564, 570-71 (1970); Stromberg v. California, 283 U.S. 359, 368 (1931).

The rule that courts should not speculate whether a verdict rests on an unconstitutional understanding of a jury instruction or some other ground is as applicable to civil cases as it is to criminal ones. Murphy v. ISKCON, 409 Mass. 842, ___ N.E.2d ___ (1991); Founding Church of Scientology v. U.S., 409 F.2d 1146, 1164 (D.C. Cir. 1969).

The Court of Appeals held that the jury resolved conflicting expert testimony to find that Munn would not have died had she agreed to a transfusion.[2] [A-16-18]. Such a finding standing alone could not be a basis for upholding the verdict, because the Court below acknowledged that Mississippi law does not require that tort victims engage in all possible steps to avoid harm resulting from the actions of a tortfeasor.

On the contrary, the Fifth Circuit agreed that under Mississippi law, some other factors (it called them subjective)

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[2] The Court of Appeals suggested that any error committed by the trial court was invited because Munn originally injected religion into the case. This suggestion does not withstand scrutiny. Munn did not invite the jury to pass on the reasonableness of her religious beliefs, only whether they were her justification for refusing blood, a very different, and constitutionally acceptable, inquiry.

could excuse a failure to avoid damage caused by a tortfeasor. [A-21-33]. That Munn would not have died had she accepted a blood transfusion does not translate into a conclusion that, as a matter of law, refusing a transfusion constituted an avoidable consequence. Indeed, in upholding the interrogatories to the jury, the Fifth Circuit conceded that the trial courts' instruction on the question of reasonableness (Interrogatory #4) "def[ied] easy categorization" [A-20] as embodying either an objective or subjective theory of the doctrine of avoidable consequences.

If Mississippi law in fact allowed only "objective" factors to excuse compliance with the avoidable consequences doctrine, and specifically excluded religious and other non-objective factors, then the question presented would be whether the Free

Exercise Clause permitted such a blanket rule to be invoked against religious objections.[3] See Petition for Certiorari at 17-23.

But if, as the Fifth Circuit held, some subjective factors are permitted to be taken into consideration by the finder of fact, with some factors within the bounds of reasonableness and others rejected as unreasonable, religion cannot, consistent with the Free Exercise Clause, be excluded from the list of permissible factors without compelling justification.

Employment Division v. Smith, 110 S.Ct. 1595 (1990) held that the Free Exercise

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[3] For reasons that do not appear, the Fifth Circuit did not certify the question of whether Mississippi law recognized a religious refusal to accept particular medical treatments as an exception to the avoidable consequence doctrine. See Rules of Mississippi Supreme Court 45.

Clause does not require preferential treatment for religion in the face of facially neutral laws which burden its practice. But Smith will not tolerate treating religion less favorably than comparable interests, beliefs or ideologies, absent a compelling interest. 110 S.Ct. at 1603. On the contrary, where a law requires an "individualized governmental assessment of the reasons for the relevant conduct . . . it may not refuse to extend that system to cases of 'religious hardship' without compelling reason. Bowen v. Roy . . ." Id. As to such cases, the rule of Sherbert v. Verner, 374 U.S. 398 (1963) that a compelling interest must be shown, remains controlling.

Smith is premised on the view that non-accommodation ensures equality between religion and non-religion, prevents the

appearance of favoring those religions which are accommodated over those that are not, and preserves the integrity of the democratic process, see, e.g., Employment Division v. Smith; Texas Monthly v. Bullock, 789 U.S. 1 (1989); Goldman v. Weinberger, 461 U.S. 503, 512-513 (1986) (Stevens, J. concurring); Bob Jones University v. U.S., 461 U.S. 574, 604, n.30 (1983). None of these justifications applies to a rule which allows individualized consideration of secular reasons for non-compliance, but not religious justifications.

Thus, even if the jury charge correctly stated Mississippi law, there is sufficient doubt as to the constitutionality of those principles as to merit the granting of the writ. Smith worked a substantial reordering of the law of Free Exercise, but expressly prohibits withholding a religious exemption

from a law or doctrine that recognizes non-religious exemption.

In any event, it is not necessary to reach that question. True, it is possible that the jury did not in fact engage in an ad hoc evaluation of the beliefs of the Jehovah's Witnesses. But given the repeated emphasis in the interrogatories on the reasonableness of Munn's beliefs, the admission of evidence on a wide range of apparently irrelevant Witness beliefs and theologies, and the closing argument of counsel, all of which focused the jury's attention on the question of the reasonableness of Munn's beliefs, it cannot be said with certainty that the jury avoided constitutionality impermissible inquiries. Cf. Yates v. Evatt, 59 U.S.L.W. 4509, 4513 (1991) ("terms of some presumptions so narrow the jury's focus so as to leave it

questionable that a reasonable juror would look to anything [else]").

Where confronted with a jury verdict which may well rest on an unconstitutional theory, this Court has "declined to choose between two such likely possibilities" Boyde v. California, 110 S.Ct. at 1197-98 and has insisted on a new trial with unambiguous instructions. That should be done here.

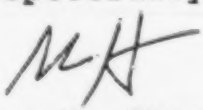
CONCLUSION

The Petition for Certiorari demonstrates that the question presented here divides the federal and state courts. Under Rule 21 of this Court's rules, that is a substantial consideration in favor of granting the writ, as is the fact that the judgment below is inconsistent with several of this Court's decisions.

But more importantly for the amici, the Court of Appeals' failure to police the jury's inquiry in this case so that it would be certain that the verdict rested on constitutionally permissible grounds raises the concern that, as religious groups increasingly find themselves in litigation over classic torts or newer theories challenging religious practices, evidence is not be admitted, nor juries instructed, in ways that permit juries to penalize unpopular theologies. We urge this Court to grant a writ of certiorari so that the

judgment below may be tested against the well settled constitutional principles it appears to flout.

Respectfully submitted,



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